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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FRED FIELDING RE SHERIFF WANICKA	1	4/12/1984	B6	1144

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
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THE WHITE HOUSE

WASHINGTON

April 12, 1984

Dear Sheriff Wanicka:

Thank you for your letter of April 5, 1984, to the President. That letter contained serious allegations about the conduct of an alleged federal investigation, and you asked that someone look into the charges outlined in your letter.

I have referred your letter to the Department of Justice for review and whatever action that Department considers appropriate. Since your letter contained allegations concerning the conduct of employees of the Department of the Treasury as well as of the Department of Justice, I have also shared your letter with the General Counsel of the Department of the Treasury.

Sincerely,

Fred F. Fielding
Counsel to the President

Sheriff Frank Wanicka
Lee County Sheriff's Department
2055 Anderson Avenue
Fort Myers, Florida 33901

FFF:JGR:aea 4/12/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

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April 12, 1984

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Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Sheriff Frank Wanicka
Lee County Sheriff's Department
2055 Anderson Avenue
Fort Myers, Florida 33901

FFF:JGR:aea 4/12/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

April 12, 1984

MEMORANDUM FOR D. LOWELL JENSEN
ACTING DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

Orig. signed by FFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Sheriff Frank Wanicka Correspondence Concerning Investigation by the Federal Grand Jury of the Lee County Sheriff's Department

The attached letter, together with a copy of my interim response, is referred to you for whatever action you deem appropriate. In his letter to the President, Sheriff Wanicka raises very serious allegations concerning the conduct of a federal investigation. I have also sent a copy of this correspondence to Peter J. Wallison, General Counsel of the Department of the Treasury, because the allegations concern the conduct of Treasury as well as Justice employees.

Attachment

FFF:JGR:aea 4/12/84 ✓
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

April 12, 1984

MEMORANDUM FOR PETER J. WALLISON
GENERAL COUNSEL
U.S. DEPARTMENT OF THE TREASURY

FROM: Orig. signed by FFF
FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Sheriff Frank Wanicka Correspondence Concerning Investigation by the Federal Grand Jury of the Lee County Sheriff's Department

The attached letter, together with a copy of my interim reply, has been referred to Lowell Jensen, Acting Deputy Attorney General, for whatever action he considers appropriate. In his letter to the President, Sheriff Wanicka raises very serious allegations concerning the conduct of a federal investigation. I am sending a copy of this correspondence to you because the allegations concern the conduct of Treasury as well as Justice employees.

Attachment

FFF:JGR:aea 4/12/84 ✓
cc: FFFielding/JGRoberts/Subj/Chron

ID# 205592

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

JR – To Frank!

INCOMING

DATE RECEIVED: APRIL 10, 1984

NAME OF CORRESPONDENT: MR. FRANK WANICKA

SUBJECT: WRITES CONCERNING THE INVESTIGATION BY THE FEDERAL GRAND JURY OF THE LEE COUNTY SHERIFF'S DEPARTMENT

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FRED FIELDING	ORG	84/04/10			/ /
REFERRAL NOTE: WAT 18	DD	84/04/11		S	84/04/21
REFERRAL NOTE:		/ /			/ /
REFERRAL NOTE:		/ /			/ /
REFERRAL NOTE:		/ /			/ /
REFERRAL NOTE:		/ /			/ /

COMMENTS: _____

ADDITIONAL CORRESPONDENTS MEDIA:L INDIVIDUAL CODES: _____

MI MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION CODES:	*OUTGOING CORRESPONDENCE
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF OUTGOING
*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT. 2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

#205592

SR

4. Fielding

Sheriff

FRANK WANICKA

Lee County Sheriff's Department
2055 ANDERSON AVENUE
Fort Myers, Florida 33901
PHONE 332-3456 (AC) 813

April 5, 1984

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

Last night on TV you spoke about cabinet members and guilt by accusation. I agree with you wholeheartedly.

The reason I write to you is that we have a parallel situation that has been going on with your cabinet members concerning members of the Lee County Sheriff's Department here in Fort Myers, Florida. For the last 2½ years we have been undergoing an investigation by the federal grand jury in Tampa, Florida lead by U. S. Attorney Robert Merkle. As yet no one has ever talked to me about any wrongdoings by members of my department to show me any proof whatsoever. Yet, news leaks consistently come out of the grand jury to discredit me, especially in this election year in which I am running.

On February 23rd I went to Washington to meet with the U. S. Justice Department and spoke to Mr. Robert Lyon giving him a packet of information concerning the investigation of our department. Information we had of possible wrongdoings by federal agents and possible criminal acts in fabrication of evidence against our employees. All along we have felt there was a political motive by members of the investigation team in Fort Myers. We believed they had a candidate they wanted to support, and we felt they were trying to discredit our department. This came to light on March 29th in front of the Lee County Courthouse when a candidate, Ed Hessinger, made his announcement. During that announcement three federal agents, who have been investigating us, gave their tacit endorsement by being present during his announcement. Enclosed is a copy the newspaper article concerning this announcement.

I ask you, Mr. President, how can we expect a fair and impartial investigation with this type of action.

I have written many different agencies about this and, as yet, I have not received any information that the Justice Department is looking into this matter.

I believe our situation is like your, Mr. President, and I would hope that someone would look into these affairs.

I in no way want to stop the investigation by the U. S. Attorney, and we are willing to cooperate as we have in the past, one hundred percent. But I just feel that I do not live in Russia and my federal government is not the KGB. I believe that we are innocent until proven guilty, and I would hope that you would feel the same way.

Mr. President, I wish you the best of luck, not just in these things that are going on with your cabinet members and Mr. Meese, but I wish you the best in the election.

May God be with you in all that you do.

Sincerely,

Frank Wanicka

Frank Wanicka
Sheriff

FW/s

Former prosecutor to run for Lee County sheriff

By BARBARA JOHNSON
News-Press Staff Writer

A former Lee County prosecutor announced his candidacy for sheriff Thursday, accusing incumbent Sheriff Frank Wanicka of actively interfering with a federal grand jury investigation of his department and harassing federal witnesses.


HESSINGER

Ed Hessinger, 32, has been a criminal defense lawyer in private practice in Fort Myers for one year and previously spent more than three years as a prosecutor specializing in narcotics cases in the office of State Attorney Joseph D'Alessandro.

"Frank Wanicka has violated the public trust by not only failing to ferret out dishonesty and corruption (in his department), but also by lying about its existence and by harassing honest individuals who try to bring it to his attention," Hessinger said at a press conference in front of the Lee County Courthouse.

Hessinger said Wanicka lied when he was quoted in a News-Press article last December as saying he has seen no evidence of drug smuggling by current or former members of his department.

"I think it's a bunch of garbage," Wanicka said of all Hessinger's allegations.

The article was about a federal investigation of alleged drug smuggling, tax evasion and corruption by current and former members of the department. The News-Press reported two targets of the probe were Col. David Wilson and former special deputy Danny Moss and that the investigation involved a major drug importation ring headed by an ex-FBI agent, who was recently convicted.

"On Oct. 4, 1982, Wanicka asked one of his 'most trusted deputies' to look into that drug smuggling situation and to report back about the involvement of Danny Moss and any of his associates," Hessinger said.

Hessinger wouldn't name the "trusted deputy" who he said had looked into the drug smuggling allegations. But Hessinger said he has an affidavit from a member of the sheriff's department, whom he wouldn't name, to back up all of his statements.

"At that time and on numerous occasions in October of 1982, Wanicka was specifically told that telephone toll records and actual eyewitness testimony strongly suggested that Col. David Wilson, Wanicka's chief deputy, was connected to drug smuggling activity involving Danny Moss and documented off-loads of narcotics in Lee County," Hessinger said.

Hessinger said Wanicka has ignored the allegations. Instead, Hessinger said, Wanicka "virtually destroyed the effectiveness" of

See ELECTION, page 2B

Election

From page 1B

his narcotics unit in November 1982 by ordering his investigators to shave their beards and wear coats, ties and short hair and by forbidding any large-scale investigations.

As a result of Wanicka's narcotics policies and "harassment," Hessinger said, Sgt. William Weaver, a former officer of the year, requested a transfer out of the narcotics unit. Hessinger said the unit's second in command, Sgt. George Bostick, also is requesting a transfer.

Wanicka wouldn't comment on the specifics of Hessinger's statement, but did say "It's riddled with untruths. I'd be happy to debate them with whoever the Democratic challenger is down the line."

Hessinger is running as a Democrat and so far faces two challengers, Bart Mauro and W. Mason Scott, in the primary. Wanicka is a Republican.

Hessinger is the only candidate to make the federal investigation an issue in the campaign and it is a prime motivation for his candidacy. Hessinger said he expects federal indictments to be issued next month in connection with the probe.

Among those who attended part or all of his press conference were two agents from the federal Drug Enforcement Administration, Jim Porten and Mike Dugan, and Internal Revenue Service agent Calvin Boyer. Boyer and Porten refused to comment on Hessinger's prediction of imminent indictments.

Hessinger said Wanicka has tried to harass and intimidate members of his department who have cooperated with the federal investigation and "spends more time fighting news leaks and the federal DEA than he does fighting crime."

Hessinger, who worked one year as a police officer for the Dade County School Board before going to law school, claims to have quiet support from many sheriff's deputies whom he met as a prosecutor on narcotics cases.

"It's kind of a serious situation for them because Frank Wanicka can fire them at will. I didn't grow up wanting to be sheriff. That's what really convinced me," he said.

In his prepared statement, Hessinger said several law enforcement agencies refuse to share sensitive information on narcotics activity with Wanicka's department because of its "reputation for dishonesty and corruption." The agencies Hessinger named were the Collier County and Hendry County sheriff's departments, state attorney's office and the DEA.

If elected, Hessinger said, he would establish an open administration and would not penalize those who bring wrongdoing to his attention.

JV

ID # 227091 CU

JR002

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

Pat & John any thoughts?

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84/05/11

Name of Correspondent: Theodore B. Olson

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Velde v. National Black Police Assn, Inc.

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CW Holland	DD ORIGINATOR	84/05/15			
CWAT09	C DD Referral Note:	84/05/16			
CWAT18	C DD Referral Note:	84/05/16			
	Referral Note:				
	Referral Note:				
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice

Office of Legal Counsel

227091 cu

Office of the
Assistant Attorney General

Washington, D.C. 20530

MAY 14 1984

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

Re: Velde v. National Black Police Association, Inc.

I presume you saw the editorial in last Wednesday's Washington Post on the Velde decision. Just in case you did not, however, I have attached a copy for your review. I also attach a copy of the D. C. Circuit decision which the Supreme Court left standing by virtue of its failure to grant certiorari. I think that this case has such major potential significance for Administration officials, particularly cabinet officials who administer programs of federal grants or assistance, that you ought to be familiar with it. At the moment, we in the Department are considering various alternatives that we might pursue in response to this decision. If you have any ideas on how we might proceed, please let me know.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments

cc: D. Lowell Jensen
Rex E. Lee
Richard K. Willard
Tex Lezar

Bureaucrat, Beware

IF YOU'RE an official of the federal government whose work involves making grants to state and local governments or private organizations, you will be interested in an action taken by the Supreme Court this week. The story begins in 1975 when a group of plaintiffs—six blacks, six women and an organization called the National Black Police Association—sued four officials of the Justice Department, claiming that their civil rights had been infringed because the Law Enforcement Assistance Administration provided grants to some police departments that discriminated. This is not a suit against the government but a personal civil action against four individuals—former attorney general Edward Levi and three LEAA officials—seeking $20 million in damages from the defendants' own pockets. This week, the Supreme Court refused to hear argument on whether this suit should be thrown out of court, so the case goes back to District Court for further proceedings and, eventually, for trial.

There are many reasons for a court to find that the suit has no merit. LEAA officials had a number of options for dealing with discrimination by grant recipients, and they took many of them. Suits were filed against some departments, multiple reviews were conducted and concessions were made by recipients. Plaintiffs acknowledge all this but have chosen to sue because a specific remedy—fund cutoff—was not pursued. On the facts, Mr. Levi and his codefendants have a good case.

But a serious policy question is also presented here: should a government official be held personally liable for acts that were not illegal or even negligent but, on the contrary, were clearly within an area of discretion required by his job? Plaintiffs in this case do not even allege that the officials acted with any discriminatory intent. In their brief requesting the Supreme Court to dismiss the suit, the defendants describe the issue clearly. "Numerous important federal programs involve the distribution of funds to agencies of state and local governments," they point out. "These programs would be substantially affected if, as the court of appeals appears to have held, the Constitution is violated whenever any funds reach any recipient agency that is known to have discriminated—even if the discrimination consists of a minor incident, the funding program serves important social objectives, and the responsible officials are taking other steps to remedy the discrimination. Indeed, under the court of appeals' approach, officials throughout the government who act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability."

The kind of personal harassment illustrated by this suit is unfair and costly to the defendants, even if they win. It also has the potential for crippling federal grant-making programs. There are better ways to enforce civil rights laws—ways that do not endanger government workers who are trying conscientiously to do a good job.

assertion of "substantially justified" legal arguments can fairly be characterized as vexatious, wanton, or oppressive, but this is certainly not one of them. In seeking dismissal under *Leedom v. Kyne*, the Board was merely asserting a well-established rule limiting the jurisdiction of the district courts to decide representation questions under the NLRA. Even on the merits of the underlying dispute, there is no evidence in the record that the Board was doing anything other than defending a routine application of its longstanding policy for dealing with decertification petitions of the sort submitted by the appellants. The fact that the Board (after a change in its membership) later altered that policy and acceded to the appellants' demands in no way suggests that its original defense of its position was not undertaken in "good faith." Accordingly, the District Court properly concluded that the appellants are not entitled to attorneys' fees under section 2412(b) of the EAJA.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is

Affirmed.

NATIONAL BLACK POLICE ASSOCIATION, INC., et al., Appellants,

v.

Richard W. VELDE, et al.

No. 77-1273.

United States Court of Appeals, District of Columbia Circuit.

June 30, 1983.

Action was brought by six blacks, six women and association of black officers charging federal agencies and their officials with unlawfully failing to terminate federal funding to local law enforcement agencies which used funds to discriminate on grounds of race and sex. The United States District Court for the District of Columbia, Howard F. Corcoran, J., dismissed, and plaintiffs appealed. The Court of Appeals, 631 F.2d 784 reversed and remanded with directions. The Supreme Court upon grant of certiorari, 102 S.Ct. 3503, vacated judgment and remanded. On remand, the Court of Appeals, Bazelon, Senior Circuit Judge, held that: (1) statute which prohibits recipients of federal financial assistance from engaging in racial discrimination imposed no clear statutory duty upon defendants to terminate financial assistance to discriminating local agencies; (2) defendants were enitled to qualified immunity from any suit based upon their failure to terminate funds under aforementioned statute; (3) defendants had statutory obligation under Crime Control Act to terminate funds of local law enforcement agencies engaging in discrimination; and (4) defendants would have constitutional duty to terminate funds to local agencies only with respect to those recipients that defendants knew or should have known were engaging in ongoing unconstitutional discrimination.

Remanded.

Tamm, Circuit Judge, filed dissenting opinion.

1. Officers and Public Employees ⇐114

Qualified immunity of public officials strikes uneasy balance between two competing concerns: need to protect individual rights from official abuse, and need to shield well-meaning official from potentially disabling threats of liability.

2. Federal Civil Procedure ⇐2547

In action brought against public official for breach of statutory or constitutional rights, court, in determining motion for summary judgment, must first determine whether rights allegedly violated were clearly established in law: if court finds

that rights were clearly established, and that there is genuine dispute over material facts, summary judgment must be denied; in subsequent proceedings, defendant can still obtain qualified immunity by showing that because of extraordinary circumstances he neither knew nor should have known that his conduct was unlawful.

3. Civil Rights ⇐9.5

Enforcement provisions of statute which prohibits recipients of federal financial assistance from engaging in racial discrimination allows funding agency to effect compliance through termination of funds or "any other means authorized by law"; therefore, failure of Law Enforcement Assistance Administration and Department of Justice and officials to terminate funding of local law enforcement agencies allegedly engaging in discrimination did not violate clearly established duty under statute. Civil Rights Act of 1964, §§ 601–605, 42 U.S.C.A. §§ 2000d to 2000d–4.

4. Civil Rights ⇐9.5, 13.8(1)

Failure of officials of Law Enforcement Assistance Administration and Department of Justice to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully did not violate clearly established duties under statute which prohibits recipients of federal financial assistance from engaging in racial discrimination; therefore, officials were entitled to qualified immunity for any suit based upon statute arising out of their failure to terminate funds. Civil Rights Act of 1964, §§ 601–605, 42 U.S.C.A. §§ 2000d to 2000d–4.

5. Civil Rights ⇐13.8(1)

Limited discretion afforded Law Enforcement Assistance Administration officials under Crime Control Act to "determine" whether recipient of federal funding has failed to comply with statute's nondiscrimination provisions and regulations, to determine whether governor of state involved has secured compliance within reasonable time, and then to determine whether failure to comply is substantial did not render officials' statutory obligation to terminate funding of recipients engaging in discrimination so unclear as to entitle officials to qualified immunity from suit based on Crime Control Act arising out of their failure to terminate funds. Omnibus Crime Control and Safe Streets Act of 1968, §§ 518(c)(2), 803, as amended, 42 U.S.C.A. §§ 3766(c)(2), 3783; § 508, as amended, 42 U.S.C. (1970 Ed.) § 3757.

6. Civil Rights ⇐9.5

Although enforcement procedures of Crime Control Act which require that Law Enforcement Assistance Administration terminate funding to recipients engaging in discrimination only begin when Administration determines that failure to comply with nondiscrimination provisions exists, Administration cannot avoid its enforcement obligations for refusing to "determine" that noncompliance exists. Omnibus Crime Control and Safe Streets Act of 1968, §§ 518(c)(2), 803, as amended, 42 U.S.C.A. §§ 3766(c)(2), 3783; § 508, as amended, 42 U.S.C. (1970 Ed.) § 3757.

7. Constitutional Law ⇐253.2(2)

Due process clause of Fifth Amendment makes applicable to federal government equal protection limitations that Fourteenth Amendment places on actions of states. U.S.C.A. Const.Amends. 5, 14.

8. United States ⇐82(2)

Federal government may not fund local agencies known to be unconstitutionally discriminating.

9. Constitutional Law ⇐215

Equal protection principles bar federal officials, like state officials, from engaging in racial discrimination. U.S.C.A. Const. Amends. 5, 14.

10. Constitutional Law ⇐215.1

Constituional obligation imposed upon government officials to refrain from engaging in racial discrimination applies not just to direct involvement but also to government support of discrimination through any arrangement, management, funds or property.

11. Constitutional Law ⇐213(3)

Activities that federal government could not constitutionally participate in directly cannot be supported indirectly through provision of support for other persons engaged in such activities.

12. Constitutional Law ⇐213(3)

Government entity may not fund discriminating entity simply because government's purpose is benevolent.

13. Constitutional Law ⇐213(3)

In determining whether government is supporting unconstitutional discrimination proper inquiry is whether relationship between government and activity in question is of such nature that activity will be treated as action of government; if so, issue is whether government could directly engage in activity consistent with constitution, and if not, government involvment is unconstitutional, regardless of its purpose.

14. Constitutional Law ⇐213(3)

Although some forms of government involvement are sufficiently indirect and complex that they require careful balancing of factors, constitutional prohibition on intentional discrimination clearly prohibits government from funding other agencies engaged in such practices. U.S.C.A. Const. Amends. 5, 14.

15. Constitutional Law ⇐213(3)

Constitutional violation by federal government does not arise only when it can be shown that discrimination would not have occurred in absence of federal funds.

16. Constitutional Law ⇐253.2(2)

Equal protection principles embodied in Fifth Amendment only prohibit federal funding of unconstitutional discrimination; thus, to extent that duty of officials of Law Enforcement Assistance Administration and Department of Justice to terminate funds to local agencies was based on constitutional equal protection guarantees, that duty only extended to funding of local agencies engaged in unconstitutional discrimination. U.S.C.A. Const.Amend. 5.

17. Constitutional Law ⇐213(3)

Clearly established duty under constitution of Law Enforcement Assistance Administration and Department of Justice officials to terminate funds of local law enforcement agencies only existed with respect to recipients of federal funds that officials knew or should have known were engaged in ongoing unconstitutional discrimination. U.S.C.A Const.Amend. 5.

On Remand from the United States Supreme Court (D.C.Civil Action No. 75–1444).

E. Richard Larson, Isabelle Katz Pinzler, Burt Neuborne, William L. Robinson and Norman J. Chachkin, New York City, were on the supplemental memorandum for appellants.

Robert E. Kopp and Barbara L. Herwig, Attys., Dept. of Justice, Washington, D.C., were on the supplemental memorandum for appellees.

Bennett Boskey, Washington, D.C., was on the supplemental memorandum for appellee, Levi.

Before TAMM, Circuit Judge, BAZELON, Senior Circuit Judge, and PARKER,* United States District Court Judge.

Opinion for the Court filed by Senior Circuit Judge BAZELON.

Dissenting opinion filed by Circuit Judge TAMM.

BAZELON, Senior Circuit Judge:

The Supreme Court vacated and remanded this case[1] for further consideration in light of its recent decision in *Harlow & Butterfield v. Fitzgerald*.[2] The remand requires that we address the following ques-

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

1. — U.S. —, 102 S.Ct. 3503, 73 L.Ed.2d 994 (1982).

2. 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

tion:[3] Did appellees have "clearly established" statutory or constitutional duties to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully on the basis of race and sex? The liability standard announced in *Harlow* entitles appellees to qualified immunity on summary judgment unless such clear duties existed.

Appellants allege that "termination" duties existed under Title VI of the Civil Rights Act of 1964, the Crime Control Act of 1973, and the due process clause of the fifth amendment. We find that such a duty was not clear under Title VI, but that clear duties to terminate funding existed under both the Crime Control Act and the fifth amendment. Accordingly, appellees are entitled to summary judgment with respect to appellants' claims for damages under Title VI, but not for the damage claims under either the Crime Control Act or the fifth amendment.

BACKGROUND

Prior Proceedings

Appellants, six blacks and six women, filed this lawsuit on September 4, 1975. They alleged that federal agencies and officials had violated appellants' constitutional and statutory rights by continuing to provide financial assistance to local law enforcement agencies that discriminate on the basis of race and sex. They claimed that this continued funding violated, *inter alia*, Title VI of the Civil Rights Act of 1964 (Title VI),[4] sections 518(c) and 509 of the Crime Control Act of 1973 (the Crime Control Act),[5] and the due process clause of the fifth amendment (fifth amendment). Appellants sought declaratory and injunctive relief against the Law Enforcement Assistance Administration (LEAA),[6] the Department of Justice, and four officials in those agencies. They also sought compensatory and punitive damages against the individual officials for alleged willful and knowing violations of their constitutional and statutory rights.[7]

On December 8, 1976, the district court granted appellees' motion for dismissal.[8] The court held that plaintiffs' claims for declaratory and injunctive relief had "been rendered moot by virtue of the enactment of the Crime Control Act of 1976," [9] which altered the statutory duties in question.[10] The court also held that appellants' damage claims against the individual officials were "barred by the doctrine of official immunity." [11]

3. Our earlier opinion, *National Black Police Ass'n v. Velde*, 631 F.2d 784 (D.C.Cir.1980), addressed three issues: mootness, standing, and official immunity. Because the mootness and standing issues are unaffected by *Harlow*, we reinstate our earlier opinion with respect to those issues. We note that the termination of the Law Enforcement Assistance Administration since our last opinion may raise new questions concerning mootness with respect to appellants' claims for injunctive and declaratory relief. Because the parties have not addressed this issue in their supplemental briefs, however, we leave it to the district court to decide any mootness issues that may have arisen since our earlier opinion.

4. 42 U.S.C. §§ 2000d–2000d–4 (1976).

5. Pub.L. No. 93–83, §§ 509, 518(c), 87 Stat. 197, 211–12, 214 (amended 1976). The Crime Control Act of 1973 amended provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90–351, title I, 82 Stat. 197 (amended version at 42 U.S.C. §§ 3701–3797 (Supp. V 1981).

6. The LEAA, an agency within the Department of Justice, was created by Congress in 1968 to assist community and citizen groups in their law enforcement and criminal justice activities. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90–351, title I, 82 Stat. 197.

7. Amended Complaint at p. 35, Appendix 38. All references to the Appendix (App.) refer to the appendix filed in *National Black Police Ass'n v. Velde*, 631 F.2d 784 (D.C.Cir.1980).

8. 3 App. 479–80.

9. *Id.* at 479.

10. *See* Pub.L. No. 94–503, § 122(b), 90 Stat. 2407, 2418–21 (1976).

11. 3 App. 480.

The Supreme Court's subsequent decision in *Butz v. Economou* [12] limited the scope of official immunity available to government officials. The Court held that as a general rule, federal officials are entitled only to a qualified immunity in suits alleging constitutional violations. To escape liability, a defendant official must establish a good faith basis and reasonable grounds for his conduct.[13] The Court identified a limited exception to this general rule for administrative officials performing judicial and prosecutorial functions, reasoning that absolute immunity was necessary to protect discretionary prosecutorial decisions from the potentially distorting effect of threats of civil liability.[14]

On appeal of the district court's dismissal of the instant case, appellees argued that their discretion in administering the LEAA funds brought them within the narrowed realm of absolute immunity identified in *Butz*. Based on the mandatory language of the statute and appellees' constitutional duty not to use federal funds in a discriminatory manner, the court found the funding termination provisions to be mandatory, "outside the realm of discretion" [15] and that absolute immunity was therefore inappropriate.[16] Accordingly, the case was remanded for appellants to prove their claims and for appellees to demonstrate the factual basis for a qualified immunity.

Appellees petitioned for review to the Supreme Court and the Court granted certiorari. While the case was pending, the Court decided *Harlow & Butterfield v. Fitzgerald*,[17] which significantly altered the law of official immunity. Shortly thereafter, the Court vacated our judgment in the instant case and remanded "for further consideration in light of *Harlow & Butterfield v. Fitzgerald*." [18] We requested the parties to file supplemental briefs on the matter.

Harlow & Butterfield v. Fitzgerald

[1] *Harlow* substantially altered the standards governing motions for summary judgment in cases involving claims of qualified immunity. However defined, qualified immunity strikes an uneasy balance between two competing concerns: (1) the need to protect individual rights from official abuse, and (2) the need to shield well-meaning officials "from potentially disabling threats of liability." [19] The Court in *Harlow* reiterated that the latter concern requires quick resolution of insubstantial claims against government officials,[20] and noted that the existing qualified immunity standard had not adequately accomplished this objective.

Prior to *Harlow*, summary judgment on questions of qualified immunity generally required both subjective and objective determinations. Summary judgment was denied if there was a factual dispute about whether an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ." [21] By alleging that an official acted with malicious intent or with a belief that a clear standard prohibited such conduct, plaintiffs could create a factual dispute that frequently required a subjective determina-

12. 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

13. *Id.* at 507, 98 S.Ct. at 2911. *Accord Scheuer v. Rhodes*, 416 U.S. 232, 247–48, 94 S.Ct. 1683, 1691–92, 40 L.Ed.2d 90 (1974).

14. 438 U.S. at 512–17, 98 S.Ct. at 2913–16.

15. 631 F.2d at 787 n. 15.

16. The Court also reversed the district court's decision that the case was moot and rejected appellees' argument that appellants lacked standing. *Id.* at 787.

17. 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

18. — U.S. —, 102 S.Ct. 3503, 73 L.Ed.2d 994 (1982).

19. 102 S.Ct. at 2732.

20. *Id.* 102 S.Ct. at 2737. *See Butz v. Economou*, 438 U.S. 478, 507–08, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978).

21. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975).

tion necessitating a trial. The need for such determinations thus frustrated the goal of terminating insubstantial lawsuits on summary judgment.[22]

[2] *Harlow* adjusted the summary judgment standard to make it rely on objective factors. Under the new standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known."[23] On summary judgment, a court must first determine whether the rights allegedly violated were clearly established in the law.[24] That determination is purely legal. If the court finds that the rights were clearly established, and that there is a genuine dispute over material facts, summary judgment must be denied. In subsequent proceedings, a defendant can still obtain qualified immunity by showing that because of "extraordinary circumstances" he neither knew nor should have known that his conduct was unlawful.[25]

Applying this standard to the instant case,[26] we must determine whether appellees' failure to terminate funding to local law enforcement agencies violated statutory or constitutional duties clearly established at the time the failure occurred. We find that appellants' allegations, judged in their most favorable light, allege violations of statutory and constitutional rights which were clearly established at the time they allegedly occurred. Summary judgment is therefore denied.[27]

ANALYSIS

Application of the Harlow *Standard*

Appellants contend that appellees' failure to terminate funding to discriminatory agencies violated clear duties imposed on them by three independent sources of law.[28] We consider each of these sources in turn.

Title VI

[3] Section 601 of Title VI prohibits recipients of federal financial assistance from engaging in racial discrimination:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[29]

The Act also prescribes measures to be taken by federal funding agencies against recipients who disregard this prohibition.[30] Of particular relevance is 42 U.S.C. § 2000d–1:

> Compliance with any requirement adopted pursuant to this section may be effected (1) *by the termination of or refusal to grant or to continue assistance* under

22. The court noted, 102 S.Ct. at 2737–38, that several courts have considered an official's subjective good faith as inherently requiring resolution by a jury. *E.g., Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912, 99 S.Ct. 282, 58 L.Ed.2d 258 (1978); *Duchesne v. Sugarman*, 566 F.2d 817, 832–33 (2d Cir.1977).

23. 102 S.Ct. at 2738 (emphasis added).

24. *Id.* 102 S.Ct. at 2739.

25. *Id.*

26. This case is technically before us on the district court's grant of a motion to dismiss. We adhere to our earlier position that absolute immunity is inappropriate and that the dismissal is to be reversed. However, because in the district court appellants had moved in the alternative for summary judgment, and because they argue that they are entitled to summary judgment as a matter of law, we will reach the question of whether summary judgment is appropriate.

27. The district court has not yet ruled whether appellants' complaint states a claim upon which relief can be granted. We did not address this issue in our first opinion, and the issue has not been briefed for us. We therefore do not view the issue as properly presented for our decision in the present posture of this case.

28. Appellants have not argued that Congress has in any way altered the common law standards for immunity with respect to the causes of action alleged in this case.

29. 42 U.S.C. § 2000d (1976).

30. 42 U.S.C. § 2000d–1 to 2000d–4 (1976).

such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, ... or (2) *by any other means authorized by law.*

(emphasis added). Appellants contend that this provision imposed on appellees a clear duty to terminate funds to agencies that unlawfully discriminate.

On its face, however, the statutory language is not mandatory. Section 2000d–1 allows the funding agency to effect compliance through funding termination or "any other means authorized by law." Although fund termination was envisioned as the primary means of enforcement under Title VI,[31] and although it has proven very effective as a deterrent to discrimination,[32] Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient.[33] The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.[34]

31. *See Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess. 1544 (1963) (testimony of Sec'y Celebrezze, HEW); *id.* at 1786–88 (testimony of George Meany, AFL–CIO); *id.* at 1890–91 (testimony of Joseph Rauh, ADA); *id.* at 2161 (testimony of Roy Wilkins, NAACP) [hereinafter referred to as *Subcommittee Hearings*]. The wording of Title VI indicates a preference for the fund cutoff remedy. Not only is fund termination mentioned first, but it is the only sanction specifically named. 42 U.S.C. § 2000d–1 (1976). The preference for fund termination under Title VI is noted in, *e.g., United States v. Jefferson County Bd. of Educ.,* 372 F.2d 836, 853 (5th Cir.1966) ("Congress was dissatisfied with the slow progress inherent in the judicial adversary process .... [and] therefore fashioned a new method of enforcement."); REPORT OF THE WHITE HOUSE CONFERENCE. TO FULFILL THESE RIGHTS 63 (1966) ("administrative proceedings prescribed by Congress as the primary device of enforcing Title VI"); VI UNITED STATES COMMISSION ON CIVIL RIGHTS. THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 22–24, 386–88 [hereinafter cited without cross-reference as VI COMMISSION REPORT —1974]; Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact,* 36 GEO.WASH.L.REV. 824, 827 (1968); *Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report,* 41 NOTRE DAME LAW 906, 922–24 (1966).

32. Early use of the sanction by HEW is instructive. Between July, 1964 and March, 1970, HEW initiated approximately 600 administrative proceedings against school districts found not to be in compliance with section 601 standards. In 400 of these cases, HEW found that the districts came into compliance following threat of termination, with no need for actual termination. Among the 200 cases in which funds were actually cut off, HEW subsequently determined that compliance had been achieved, and federal assistance was resumed in all but 4 districts. VI COMMISSION REPORT—1974, at 384–85. *See Adams v. Richardson,* 480 F.2d 1159, 1163 n. 4 (D.C.Cir.1973) (en banc); Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement,* 58 VA.L.REV. 600, 619 (1972); Comment, *supra* note 31, at 871.

33. H.R.REP. No. 914, 88th Cong., 1st Sess. 86 (1963), U.S.Code Cong. & Admin.News 1964, 2355. *See* Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982). The Guidelines also suggest a number of administrative alternatives to funding termination. *Id.*

34. *Subcommittee Hearings, supra* note 31, at 1381–82 (testimony of Att'y Gen. Kennedy), 1544 (testimony of Sec'y Celebrezze, HEW), 1890 (statement of Rep. Celler); 110 CONG.REC. 2467 (1964) (statement of Rep. Gill).

The grant of a choice of remedies was also an attempt to accommodate competing views. Some civil rights advocates felt that funding termination should be mandatory. They saw in the relatively unbridled discretion of the agencies the potential for its abuse by a program-oriented bureaucracy or an inactive administration. *See, e.g., Subcommittee Hearings, supra,* at 2093–94 (testimony of Sidney Zagri, Teamsters Union), 2352 (statement of Rep. Halpern). As Roy Wilkins, Executive Secretary of the NAACP, explained:

> [W]e always shy away from "discretionary" in these areas. We feel that unless [funding termination] is made mandatory, all sorts of discretion will be exercised and until it is demonstrated in good faith that discretion means discretion and does not mean discrimination, then we would want mandatory phraseology in there.

Id. at 2161. Others opposed the funding termination remedy either on the grounds that it would jeopardize minority-oriented programs or that it would be an unwise or unconstitutional assumption of power by the executive. *See* 110 CONG.REC. 2466 (1964) (statement of

Faced with this statutory discretion, we cannot say that appellees' failure to terminate funding violated a clearly established statutory duty under Title VI.

Adams v. Richardson,[35] on which appellants rely heavily, does not establish clear law to the contrary. In that case, officials of the Department of Health, Education, and Welfare (HEW) insisted that enforcement of Title VI was entirely committed to agency discretion and that an agency's decision to rely on voluntary compliance was therefore unreviewable in the courts. The court rejected that contention, but did not suggest that termination was the *only* available means for securing compliance. The court noted that "[t]he Act sets forth two alternative causes of action by which enforcement may be effected," [36] and that a failed request for voluntary compliance "does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute." [37] Thus, while *Adams* makes it clear that federal funding agencies must do *something* to effect compliance, it did not clearly establish that funding termination was required.[38]

[4] In holding that appellees' failure to terminate funding did not violate clearly established duties under Title VI, we do not imply that appellees have complied with that statute. Appellants' allegations concerning appellees' efforts to enforce their civil rights mandate paint a less than exemplary picture.[39] Compliance with Title VI might well have required appellees to pursue compliance more vigorously than they did, and injunctive relief may have been appropriate. But Title VI has been criticized as ineffective in securing civil rights, and such ineffectiveness has been attributed to the discretion in the statute precisely where appellants claim that there is none.[40] Because of that discretion, it was not clear that Title VI duties would be violated by a failure to terminate funds.

Rep. Elliott); *id.* at 6527 (statement of Sen. Holland); *Subcommittee Hearings, supra* note 31, at 1583 (statement of Rep. Dorn); H.R.Rep. No. 914, 88th Cong., 1st Sess. 64, 86 (1963).

35. 480 F.2d 1159 (D.C.Cir.1973) (en banc).

36. *Id.* at 1163.

37. *Id.*

38. Appellants cite several other cases from different circuits in support of their position. *Gautreaux v. Romney,* 448 F.2d 731 (7th Cir. 1971), is perhaps closest on point. In that case, however, the precise question was whether the federal funding agency's "knowing acquiescence in [an] admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964." Although the court made clear that violations of both sources of law had occurred, it did not make clear whether the agency's Title VI obligations could have been satisfied by a vigorous enforcement scheme that stopped short of fund termination.

39. If true, the picture is not unlike the disappointing civil rights efforts of several other federal agencies. The antipathy with which the federal bureaucracy has viewed Title VI has been documented by the Civil Rights Commission:

> The enforcement failure was the result, to a large extent, of placing the responsibility for ensuring racial and ethnic justice upon a massive Federal bureaucracy which for years had been an integral part of a discriminatory system. Not only did the bureaucrats resist civil rights goals; they often viewed any meaningful effort to pursue them to be against their particular program's self-interest.

United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—A Reassessment 7 (1973) [hereinafter cited as Commission Report—1973]. *See* United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 1091–92 (1970) [hereinafter cited as Commission Report—1970]; Tomlinson & Mashaw, *supra* note 32, at 619.

The Department of Justice Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982), issued in 1965, suggested alternative judicial and administrative means of enforcement and authorized fund termination only where those alternatives would be ineffective or inappropriate. The Civil Rights Commission found that every agency it examined in 1974 had failed to cut off funds in cases where termination would have been the appropriate means of enforcement. VI Commission Report—1974, at 653, 762–97. *See Adams v. Weinberger,* 391 F.Supp. 269, 271 (D.D.C.1975).

40. *See,* Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights,* 85 Yale L.J. 720, 723–28 (1976).

Appellees are therefore entitled to qualified immunity for any suit based on Title VI arising out of their failure to terminate funds.

The Crime Control Act

The broad discretion over enforcement methods provided by Title VI is in sharp contrast to the mandatory language of the Crime Control Act. Section 518(c)(2) of the Act stated:

> Whenever the Administration [LEAA] determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirements], it *shall* notify the chief executive of the State of the noncompliance and *shall* request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration *shall* exercise [its funding termination powers],[41] and is authorized concurrently with such exercise—
>
> (A) to institute an appropriate civil action;
>
> (B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or
>
> (C) to take such other action as may be provided by law.[42]

Congress enacted this statutory command in 1973, when it reviewed LEAA's initial grant of funds. In reviewing LEAA's civil rights enforcement efforts, Congress was struck by the agency's failure to follow the spirit of Title VI.[43] The number of the agency's staff assigned to civil rights was criticized as entirely inadequate.[44] Although LEAA had received numerous complaints of discrimination by recipients, it had *never* applied any sanctions and had *never* held a compliance hearing.[45] Indeed, LEAA had *never* even promulgated procedures for such a hearing.[46] Justice Department regulations governing LEAA expressed a preference for enforcement through judicial proceedings rather than fund termination,[47] yet LEAA had apparently never referred a case to the Attorney

41. More precisely, the statute requires the Administration to exercise "the powers and functions provided in section 509 of this title," which states that

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration *shall* notify such applicant or grantee that further payments *shall* not be made (or in its discretion that further payments *shall* not be made for activities in which there is such failure), until there is no longer such failure.

42 U.S.C. § 3757 (Supp. V 1975) (current version at 42 U.S.C. § 3783 (Supp. V 1981)) (emphasis added).

42. 42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976) (emphasis added).

43. *See Hearings on the Law Enforcement Assistance Administration Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 345 (1973) (statement of Sarah Carey) [hereinafter cited as *LEAA Hearings*]; 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LAW AND DISORDER 32–36 (1973); 119 CONG.REC. 20,070–71 (1973) (statement of Rep. Jordan).

44. Until 1971, LEAA had no civil rights office responsible for implementing its Title VI regulations; once established, the office was understaffed. *See* COMMISSION REPORT—1973, *supra* note 39, at 97; COMMISSION REPORT—1970, *supra* note 39, at 601, 634.

45. *See* COMMISSION REPORT—1973, *supra* note 39, at 100–01.

46. *See id.* at 100 n. 27.

47. 28 C.F.R. § 42.206(a) (1975) provided: "[W]here the responsible department official determines that judicial proceedings ... are as likely or more likely to result in compliance than administrative proceedings ..., he shall invoke the judicial remedy rather than the administrative remedy." In 1973, the Civil Rights Commission concluded that "LEAA has administratively repealed the remedy of fund cutoff." COMMISSION REPORT—1973, *supra* note 39, at 101 n. 36.

General, and only rarely had intervened in private suits.[48]

Against this background, Congress created a set of more stringent enforcement requirements addressed specifically to LEAA's civil rights obligation.[49] Congress explicitly rejected President Nixon's version of the bill, which merely stated that Title VI applies to LEAA.[50] Instead, Congress adopted sections 509 and 518(c)(2), which outlined a mandatory enforcement scheme that relies on funding termination. By doing so, Congress explicitly prevented LEAA from relying on the Title VI option of "any other means authorized by law."

Representative Jordan, originator of the mandatory provision,[51] described her amendment to the Act as follows:

> The effect of my amendment ... is to *require* LEAA *to first* use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification hearings and negotiations is spelled out in section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.
>
> This amendment was necessary to *reverse* LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements.[52]

[5] Despite this statutory language and legislative history, appellees argue that the Crime Control Act provided them "broad enforcement discretion." Although their position is clearly exaggerated, some limited discretion under the statute does exist. Thus, LEAA must "determine" whether a recipient of LEAA funding has failed to comply with the statute's nondiscrimination provision and LEAA regulations. After notifying the recipient state's governor of the noncompliance, LEAA has to determine whether the governor has secured compliance "within a reasonable time." The administrator must then determine whether failure to comply is substantial, at which point some form of fund termination is mandatory.

These limited areas of discretion do not, however, render appellees' statutory obligation so unclear as to entitle them to qualified immunity as a matter of law. Appellants have alleged, with some support, that rampant discrimination existed among recipients of LEAA funds. Many recipient agencies were involved in lawsuits alleging

48. 119 CONG.REC. 20,071 (1973) (statement of Rep. Jordan). In two of the suits, *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974), and *Castro v. Beecher*, 459 F.2d 725 (1st Cir.1972), LEAA intervened ten months and eight months after the suits were brought and only "as a result of a great amount of external pressure ... to take some action." UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER 147 (1971). In the third case, intervention was by court order. 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 43, at 36.

49. Crime Control Act of 1973, Pub.L. No. 93–83, § 2, 87 Stat. 197, 211–2, 214 (amended 1976).

50. *LEAA Hearings*, *supra* note 43, at 26 (text of Administration bill, S. 1234, 93d Cong., 1st Sess. § 308(b)(2) (1973)).

51. Her original amendment made two major changes: it imposed a 60-day time limit on voluntary compliance efforts, after which enforcement action was required, and it replaced the discretionary choice of sanctions permitted under Title VI with mandatory fund termination. Concurrent with termination, the agency could use other enumerated means in its efforts to obtain compliance. 119 CONG.REC. 20,071 (1973) (statement of Rep. Jordan). The Jordan version passed the House, *id.* at 20,105, but was revised in the conference committee to accommodate the views of the Senate, which had approved the President's proposal. The statute which emerged provided for mandatory termination after a "reasonable time" rather than after 60 days, but retained the requirement that, in the words of the conference committee, "LEAA *must* initiate proceedings to cut off funds to any recipient who continues to discriminate after that period, and may, concurrently with that initiation, take other actions." SENATE CONF.REP. No. 349, 93d Cong., 1st Sess. 32 (1973), U.S.Code Cong. & Admin.News 1973, 1729 (emphasis added).

52. 119 CONG.REC. 20,071 (1973) (emphasis added).

unlawful discrimination.[53] Other recipients reportedly pursued policies that constituted prima facie evidence of discrimination.[54] The few compliance investigations conducted by LEAA allegedly turned up widespread noncompliance.[55] If such allegations are true, LEAA's obligations were clear under the 1973 amendments to the Act. Notification of the state's governor was required, and funding termination proceedings were to be instituted in cases where voluntary compliance failed. Appellants have alleged that very few (perhaps only one) notices to governors were sent, and that funding termination proceedings were never brought prior to commencement of the instant suit. In the words of the House Committee on the Judiciary, "LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to fund violators of the Act." [56]

Significantly, appellants' allegations of bad faith do not principally involve appellees' exercise of judgment in those areas where appellees contend the Act is ambiguous. Appellants' claims are not based on either appellees' application of the "reasonable time" allowance for effecting voluntary compliance, or the "substantial failure" determination that ultimately makes termination mandatory. Rather, the allegations involve principally the failure of LEAA officials to notify the governors of states where recipients were discriminating, and to institute administrative funding termination proceedings where they had determined that voluntary efforts would not succeed. The purpose of qualified immunity is to protect officials from liability where ambiguity in the law prevents them from knowing how properly to carry out their duties. We do not see how such ambiguity affected the appellees in this case.

[6] It is true, of course, that the enforcement procedures of 518(c)(2) only begin "[w]henever the Administration [LEAA] determines" that a failure to comply exists. This language does not mean, however, that LEAA could avoid its enforcement obligations by refusing to "determine" that noncompliance existed. It is one thing for an agency to proceed cautiously because of the possible consequences of terminating funds. It is something quite different to abdicate the civil rights enforcement role that Congress clearly intended LEAA to play. Appellants have alleged and provided some support showing that

53. "[O]f the 50 largest police departments receiving LEAA funds, 26 were parties to [lawsuits alleging discriminatory practices]." *See* VI COMMISSION REPORT—1974, at 380.

54. *See id.* at 377–78.

55. "LEAA staff have stated that the majority of LEAA recipients it has reviewed were found to engage in some form of discriminatory practice." *Id.* at 361 n. 968.

56. Report of the House Committee on the Judiciary, H.R.REP. No. 1155, 94th Cong., 2d Sess. 11 (1976). Moreover, in a limited number of cases, LEAA did refer cases to the Justice Department. VI COMMISSION REPORT—1974, at 383. It is unclear on what basis such action would have been taken unless LEAA believed the recipient was out of compliance. The statute and congressional intent were explicit that, in such circumstances, referral to the Justice Department was to be concurrent with the initiation of fund termination proceedings.

This set of circumstances is presented most clearly with respect to the Philadelphia Police Department. On Feb. 1, 1974, appellee Herbert Rice, Director of LEAA's Office of Civil Rights Compliance, sent the Philadelphia Police Commissioner a mailgram, which stated:

> THIS WILL ALSO FORMERLY [sic] ADVISE YOU THAT LEAA HAS DETERMINED THAT THE PHILADELPHIA POLICE DEPARTMENT HAS FAILED TO COMPLY WITH [THE NONDISCRIMINATION REGULATIONS]. THE LEAA HAS FURTHER DETERMINED THAT COMPLIANCE WITH THE REGULATIONS CANNOT BE ACHIEVED BY VOLUNTARY MEANS. ACCORDINGLY, THIS MATTER HAS BEEN REFERRED TO THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE FOR CONSIDERATION OF THE INSTITUTION OF APPROPRIATE LEGAL PROCEEDINGS.

App. 91. Appellees have not offered a satisfactory explanation for why, in light of the language of § 518(c)(2), funding termination proceedings were not instituted concurrent with the referral of the case to the Justice Department.

unlawful discrimination among funded agencies was rampant and that LEAA officials were aware of that fact. A wholesale refusal to make the determinations clearly contemplated by the Act might well defeat a claim of good faith.

The Fifth Amendment

[7, 8] In addition to any statutory duties appellees may have had, appellants assert that appellees had a constitutional duty not to fund local law enforcement agencies known to be discriminating. Appellants derive this duty from the due process clause of the fifth amendment, which makes applicable to the federal government the equal protection limitations that the fourteenth amendment places on the actions of states. Although appellants will have the burden of establishing several difficult issues of fact,[57] it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating.

[9–11] Equal protection principles bar federal officials, like state officials, from engaging in racial discrimination.[58] This constitutional obligation applies not just to direct involvement, but also to government "support" of discrimination "through any arrangement, management, funds or property." [59] Activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.[60] This prohibition encompasses various forms of support that are much less direct than the funding involved in this case.[61]

[12] Appellants contend that because their purpose in funding law enforcement agencies is the constitutionally permissible goal of promoting law enforcement, the fact that recipients of their funds discriminate does not make the funding itself unconstitutional. It is clear, however, that a government entity may not fund a discriminating entity simply because the government's purpose is benevolent. In *Norwood v. Harrison,*[62] a case examining the constitutionality of a state providing free textbooks to private schools that practice racial discrimination, the Court emphatically stated, "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty." [63]

Appellants suggest that these firm constitutional principles, reiterated in *Norwood,* were tacitly changed by the Supreme Court opinions in *Personnel Administrator of Mas-*

57. *See infra* p. 583 & note 77.

58. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

59. *Cooper v. Aaron,* 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5, 19 (1958). *See Norwood v. Harrison,* 413 U.S. 455, 467, 93 S.Ct. 2804, 2811, 37 L.Ed.2d 723 (1973).

60. *Norwood v. Harrison,* 413 U.S. 455, 465, 93 S.Ct. 2804, 2810, 37 L.Ed.2d 723 (1973).

61. Many forms of support have been found unconstitutional in the frequently litigated field of government involvement with segregated schools. *See id.* (free textbooks for racially discriminating private schools); *Brown v. South Carolina State Bd. of Educ.,* 296 F.Supp. 199 (D.S.C.), *aff'd,* 393 U.S. 222, 89 S.Ct. 449, 21 L.Ed.2d 391 (1968) (state tuition grants to students attending racially discriminatory schools); *Poindexter v. Louisiana Fin. Assistance Comm'n,* 275 F.Supp. 833 (E.D.La.1967), *aff'd,* 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 80 (1968) (same); *Lee v. Macon County Bd. of Educ.,* 267 F.Supp. 458, 475–78 (M.D.Ala.) (same), *aff'd sub nom. Wallace v. United States,* 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422 (1967); *cf. Green v. Connally,* 330 F.Supp. 1150, 1164–65 (D.D.C.), *aff'd sub nom. Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971) (tax exemptions to discriminatory private schools).

As the Court pointed out in *Norwood,* however, equal protection principles do not prohibit the provision of *all* forms of government services provided to discriminatory institutions. 413 U.S. at 465, 93 S.Ct. at 2810. For example, the Constitution does not prohibit the provision of generalized services over which the state has an operating monopoly, such as electricity, water, and police and fire protection. *Id.; Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

62. 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973).

63. *Id.* at 466, 93 S.Ct. at 2811.

sachusetts v. Feeney,[64] and *Washington v. Davis*.[65] These cases held that government action that has only a discriminatory effect does not constitute a violation of equal protection guarantees. To establish such a violation, it must also be shown that the government action had an invidiously discriminatory purpose. Appellees contend that the holdings in these cases make it constitutionally permissible for the federal government to fund discriminating agencies so long as the federal government's purpose is not the furtherance of discrimination.[66]

Feeney and *Davis* addressed completely different issues from the one addressed in *Norwood*, and we do not accept the contention that they implicitly overruled the long-standing principles on which *Norwood* is based. *Feeney* and *Davis* both involved facially neutral government practices that allegedly had a disparate impact on Blacks (*Davis*) and women (*Feeney*).[67] The issues presented were whether disparate impact alone could render unconstitutional a government practice that is neutral on its face. The Court found that such practices were not unconstitutional.

[13] In contrast, *Norwood* is just a recent example of a long line of cases concerning the constitutionality of government involvement in practices which the fifth and fourteenth amendments prohibit the government from engaging in directly.[68] The proper inquiry is whether the relationship between the government and the activity in question is of such nature that the activity will be treated as an action of the government. If so, the issue is whether the government could directly engage in the activity consistent with the Constitution. If not, the government involvement is unconstitutional, regardless of its purpose.[69] We do not suppose that the Supreme Court implicitly changed these firm principles *sub silentio* in *Feeney* and *Davis*.[70]

64. 442 U.S. 256, 273–81, 99 S.Ct. 2282, 2293–97, 60 L.Ed.2d 870 (1979).

65. 426 U.S. 229, 239–41, 96 S.Ct. 2040, 2047–48, 48 L.Ed.2d 597 (1976).

66. *Cf. Bob Jones University v. United States*, —— U.S. ——, —— n. 4, 103 S.Ct. 2017, 2022 n. 4, 76 L.Ed.2d 157 (1983) (Rehnquist, J. dissenting) (tax exemption of racially discriminatory schools under facially neutral statute granting general exemption to schools is permissible, absent invidiously discriminatory purpose). It is unclear whether Justice Rehnquist, in his lone dissent, premises his conclusion on the view that tax exemptions are not state action. *See Walz v. Tax Comm'n*, 397 U.S. 664, 675, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970). If, however, Justice Rehnquist intends to extend this principle to clear instances of active state involvement with purposive discriminators, then a number of well-established precedents would have to be overruled. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 573–74, 94 S.Ct. 2416, 2426, 41 L.Ed.2d 304 (1974); *Norwood v. Harrison*, 413 U.S. 455, 466–67, 93 S.Ct. 2804, 2811, 37 L.Ed.2d 723 (1973); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721–22, 81 S.Ct. 856, 859–60, 6 L.Ed.2d 45 (1961); *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5, 19 (1958). *See infra* pp. 581–582.

67. *Davis* involved a written examination administered to applicants for positions in the District of Columbia Police Department. The examination excluded a disproportionate number of Black applicants. 426 U.S. at 234–36, 96 S.Ct. at 2045. *Feeney* involved a Massachusetts statute which gave qualified veterans an absolute preference over qualified nonveterans in state civil service positions. The statute had an overwhelmingly negative impact on civil service opportunities for women because so few women at the time were veterans. 442 U.S. at 259, 99 S.Ct. at 2285.

68. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721–22, 81 S.Ct. 856, 859–60, 6 L.Ed.2d 45 (1961); *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5, 19 (1958).

69. In *Norwood*, for example, the Court pointed out that the district court found that the free textbook program had been established in 1940, long before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), had found segregated schools unconstitutional. From this fact, the Supreme Court's analysis proceeded on the assumption that the program was not motivated by an illegally discriminatory purpose.

70. Appellees' reading of *Feeney* and *Davis* has rather startling implications. It would seem, for example, that their interpretation would allow the federal government to fund directly segregated schools as long as the purpose for doing so was educational rather than discriminatory.

[14] The distinction between *Feeney* and *Davis* and *Norwood* can be illustrated with reference to the instant case. Appellants allege that agencies receiving LEAA funds practiced unconstitutional discrimination. *Feeney* and *Davis* make clear that for such to be true, the discrimination must be purposeful. If such discrimination does exist, however, the issue then becomes whether funding is a form of involvement that requires us to impute the actions and motives of the local agencies to the federal government. Although some forms of government involvement are sufficiently indirect and complex that they require a careful balancing of factors,[71] the constitutional prohibition on intentional discrimination clearly prohibits the government from funding other agencies engaged in such practices.[72]

[15] A constitutional violation, moreover, does not arise only when it can be shown that discrimination would not have occurred in the absence of federal funds. As the Court in *Norwood* stated about aid to racially segregated schools, "the Constitution does not permit the state to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." [73] Thus, in order to establish that a violation has occurred, appellants need not show that a particular instance of discrimination would not have occurred in the absence of federal funding.[74] Such a showing may be relevant in calculating damages, if any, but not to the initial question of whether a violation has occurred.

[16] In stating these principles, two important clarifications are in order. First, the equal protection principles embodied in the fifth amendment only prohibit federal funding of *unconstitutional* discrimination. Statutory and regulatory schemes may prohibit various forms of discrimination that are not constitutionally prohibited.[75] To the extent that appellees' duty to terminate funds is based on constitutional equal protection guarantees, that duty only extends to the funding of local agencies engaged in unconstitutional discrimination.

[17] Second, appellees' clearly established duty to terminate funds only existed with respect to recipients that appellees *knew or should have known* [76] were en-

71. *See, e.g., Gilmore v. City of Montgomery,* 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) (use by segregated private schools of public recreational facilities); *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (discrimination by private restaurant in publicly owned facility).

72. *See, e.g., Gautreaux v. Romney,* 448 F.2d 731 (7th Cir.1971) (federal funding of discriminatory housing program violates due process); *Green v. Connally,* 330 F.Supp. 1150, 1164–65 (D.D.C.) (Leventhal, J.) ("Clearly the Federal Government could not under the Constitution give direct financial aid to [institutions] practicing racial discrimination."), *aff'd sub nom. Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971).

73. The district court in that case had stressed the absence of a showing that "any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools." 340 F.Supp. 1003, 1013 (1972). The Court found that fact irrelevant in deciding whether a violation had occurred. 413 U.S. at 465, 93 S.Ct. at 2810 (1972).

74. In this regard we note, however, the successful experience of some other agencies, particularly HEW, in using fund termination as a method of obtaining compliance. *See Adams v. Richardson,* 480 F.2d 1159, 1163 n. 4 (D.C. Cir.1973) (en banc).

75. *See, e.g., Washington v. Davis,* 426 U.S. 229, 238–39, 96 S.Ct. 2040, 2046–47, 48 L.Ed.2d 597 (legal standards governing discrimination under Title VII of Civil Rights Act of 1964 are not the same as under fifth amendment).

76. There is some suggestion in various cases that the fifth amendment imposes a duty on federal officials to police actively recipients of federal funds to ensure that they are not practicing discrimination. *See, e.g., NAACP, Western Region v. Brennan,* 360 F.Supp. 1006, 1012 (D.D.C.1973) ("the Fifth Amendment impose[s] upon federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State and local agencies funded by them.") We take no position on the existence or extent of any such duty because we conclude that the nature of any such duty is not clearly estab-

gaged in ongoing unconstitutional discrimination.[77] Such a knowledge requirement is consistent with the purpose of qualified immunity, which is to protect government officials whose limited knowledge prevents them from conducting their duties without committing occasional honest mistakes. The appropriate inquiry involves both a subjective and objective examination of the extent of appellees' knowledge. Such a subjective inquiry is not inconsistent with *Harlow,* which only precludes a subjective inquiry prior to finding that the state of the law allegedly violated was clear. Appellants can use whatever evidence is available through discovery to establish that appellees knew a particular recipient of funds was unconstitutionally discriminating.

Conclusion

Under the *Harlow* standard, appellees are entitled to summary judgment regarding appellants' claims for damages under Title VI. With respect to the damage claims under the Crime Control Act and the fifth amendment, however, appellants have alleged violations of "clearly established statutory and constitutional rights." For that reason, we adhere to our rejection of appellees' claim of qualified immunity at this stage of the proceeding. The case is remanded to the district court for further proceedings.

So ordered.

TAMM, Circuit Judge, dissenting:

For the reasons stated in my prior dissenting opinion in this case, 631 F.2d at 791–94, I would hold that the individual defendants are protected by absolute immunity. Accordingly, I respectfully dissent from the majority opinion. Because the *Harlow* standard for qualified immunity does not affect my position on the defendant's absolute immunity, I need not discuss *Harlow.*

lished. We note, however, that the absence of a clear duty to investigate affirmatively does not protect individuals for actions displaying deliberate indifference to constitutional rights. *See Carlson v. Green,* 446 U.S. 14, 15, 16–17, 100 S.Ct. 1468, 1469, 1470, 64 L.Ed.2d 15 (1980); *Estelle v. Gamble,* 429 U.S. 97, 104–05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976).

77. This issue is, of course, simplified in cases where it is accepted that the activity receiving government support could not be practiced directly by the federal government (*e.g.,* segregated schools). The issue is much more difficult where, as here, any activity that was unconstitutional for appellees to fund was also unconstitutional for the recipients to practice. Because none of the recipients acknowledges participation in unconstitutional activities, appellants will have the difficult burden of establishing that such discrimination existed and that appellees knew of its existence.

JV

ID # 227091 CU

JR002

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Pete John anything?

☐ O - OUTGOING
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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Theodore B. Olson

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Velde v. National Black Police Assn., Inc.

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CW Holland	DD ORIGINATOR	84/05/15			1 1
CWAT09	Referral Note: C DD	84/05/16			1 1
CWAT78	Referral Note: C DD	84/05/16			1 1
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X - Interim Reply

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5/81

THE WHITE HOUSE

WASHINGTON

May 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Kansas City Chiefs' Crime Prevention Promotion

Kip Hawley has asked for our views on a request by the Kansas City Chiefs to publicize the President's support for their crime prevention program. The Chiefs participate in a program, sponsored by Frito Lay and television station KCTV, under which cards with a football player on one side and a crime prevention tip on the other are distributed to youths by neighborhood policemen. During the National Crime Prevention Week ceremony on February 15, 1984, the President cited the Chiefs' crime prevention card program as one example of a successful crime prevention initiative. The Chiefs are preparing to launch their 1984 crime prevention card program, and would like to make use of the President's recognition. The Chiefs Director of Promotions would like to explore the possibility of (1) using footage from the February 15 ceremony in public service announcements concerning the program, (2) using "some sort of Presidential logo" on the cards, and (3) using a photograph of the President on promotional posters.

The Chiefs' crime prevention card program has been very successful, and there is no indication of any ulterior motive in this effort to publicize the program by making use of the President's recognition. Nonetheless, I am compelled to recommend against approval of any of the suggestions submitted by the Chiefs. Any active role by the President in publicizing this program would inevitably precipitate requests that he actively publicize other equally worthy crime prevention programs. As you noted, other professional sports teams have programs similar to that of the Chiefs, and I do not see how the President could turn down requests to promote those if he promoted that of the Chiefs. While the President certainly can and should single out and praise successful private sector initiatives on appropriate occasions -- as he did at the February 15 ceremony -- he should not become a hawker for particular programs, however laudable.

Other problems are presented by the Chiefs' specific suggestions. The only "Presidential logo" is the Seal, and its use on cards neither produced nor distributed by the White House would be inconsistent with limitations we have enforced in the past. The appearance of the Seal on cards bearing the Frito Lay and KCTV corporate logos would also present commercial endorsement problems. The Presidential poster suggestion evokes images of the Jerry Lewis posters staring out from every 7-11 counter.

Attached is a memorandum for Hawley noting that we cannot approve any of the Chiefs' suggestions.

Attachment

held an expanded meeting in the Cabinet Room.

Again in the Oval Office, King Hussein joined the two Presidents. They all, with their advisers, then held a working luncheon in the State Dining Room.

United States Forces in Lebanon

Letter to the Speaker of the House and the President Pro Tempore of the Senate. February 14, 1984

Dear Mr. Speaker: (Dear Mr. President:)

I am providing herewith a further report with respect to the situation in Lebanon and the participation of the United States Armed Forces in the Multinational Force. This report, prepared by the Secretaries of State and Defense and covering the period from December 12, 1983 to February 13, 1984, is consistent with Section 4 of the Multinational Force in Lebanon Resolution. This report also includes the information called for by the House version of the Resolution and is submitted consistent with its more restrictive time limits.

Congressional support for our continued participation in the Multinational Force remains critical to peace, national reconciliation, and the withdrawal of all foreign forces from Lebanon. We will continue to keep you informed as to further developments with respect to this situation.

Sincerely,

Ronald Reagan

Note: This is the text of identical letters addressed to Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and Strom Thurmond, President pro tempore of the Senate.

National Crime Prevention Week

Remarks at a White House Ceremony. February 15, 1984

The President. Well, thank you very much, and welcome to the White House. We want you to enjoy yourselves, so I hope that all the police chiefs here can sit back and relax and stop worrying about what your deputies are doing back at headquarters. [*Laughter*]

I'm delighted to have the opportunity to help recognize National Crime Prevention Week and to tell you that crime prevention is a top priority on the national agenda. Americans should have the right and the opportunity to walk our streets without being afraid, to feel safe in our own homes, and to be confident that when our children leave the house they'll return safely.

For too many years, crime and the fear of crime robbed the—or eroded the strength and vitality of our neighborhoods. We're finally making some headway. In 1982—or maybe you've already been told and know that the crime rate dropped by 4.3 percent, and that's the biggest drop since 1972.

And just last week the Senate under the able leadership of our Judiciary Committee chairman, Strom Thurmond, overwhelmingly passed our comprehensive crime control initiatives. Now, if the House would act—and for the life of me I don't know what they're waiting for—we could finally put a comprehensive and long-overdue anticrime package on the books. Clay,[1] we'll be working with you to try to get them moving on this.

We know that formidable challenges remain, and meeting them is what Crime Prevention Week is all about. This year the spotlight is on the Neighborhood Watch. But crime prevention is much more than that, and it's a nationwide movement. All across the country people are working together with law enforcement agencies to protect themselves, their loved ones, and their neighborhoods.

The National Exchange Club started the movement 37 years ago. And today its nearly 1,300 service clubs nationwide are working hard to promote crime preventive activities. The American Association of Retired Persons is helping the elderly. The National Crime Prevention Council and its spokesdog, McGruff, are leading a nation-

[1] *Representative Clay Shaw.*

wide anticrime education program. The National Sheriffs Association has a key role in the Neighborhood Watch program.

Even sports teams are getting into the act. The Kansas City Chiefs, supported by local business, distribute football cards to local police departments, which in turn give them away to neighborhood children. The cards have a color-action picture of a player on one side and a crime-prevention tip on the other. The only way to get a card is to ask a policeman, which reinforces positive communications between the cop on the beat and the neighborhood children.

In the past 3 years, 16 million cards have been given away. And now several other teams, including the Washington Redskins, are following suit.

And, of course, our nation's law enforcement officers are on the frontlines performing a tough job under enormous pressure. They're expected to be administrators, social workers, public relations experts, at times, philosophers and politicians, and still somehow always be an officer of the law. And I thought my job was tough. [*Laughter*] Well, let me assure police officers everywhere of our firm support and unfailing gratitude. If we can get our comprehensive crime control act through the House, I think your job will become a little bit easier.

And now, let me commend the Neighborhood Watch program. It's a program that I really like. In preparing for this ceremony, we did a little research and discovered that, using conservative estimates, of course—no other kind—[*laughter*]—that one in six live in a community with a citizen anticrime program. Watch programs in nearly 30,000 communities involve about 10 million volunteers. The best news is that they're doing a great job. Fairfax County, Virginia, reported a 44-percent drop in burglary over the last 3 years. Each day and night a thousand citizens watch out for their neighbors. Chief Buracker estimates that it would cost the taxpayer $30 million a year to replace this volunteer effort.

In Florida's Dade County, a youth crime watch program is credited for much of the 25-percent decline in school crime and 20-percent drop in narcotics use since 1983—pardon me—1981. That would have been a sudden drop. We're seeing the same positive results with watch programs all over the country, from Seattle to Las Vegas to Jackson, Mississippi. And what we're really witnessing is a reaffirmation of American values: a sense of community and fellowship, individual responsibility, caring for family and friends, and a respect for the law.

I hope we can mark our observance of National Crime Prevention Week by redoubling our efforts. We'll continue cracking down on career criminals, organized crime, drug pushers, and pornographers. We'll continue working to protect the interests of victims. But the strongest guardian against crime is the American people and the institutions that bind us together as a free society. Together we can turn the tide on crime and make it permanent. And with your help, we will.

And now, it gives me great pleasure to award the George Washington Honor Medal to PACT, Police and Citizens Together, for their fine efforts in law enforcement. And I am delighted to present this award to Chief Maurice Turner of the District of Columbia Police Department and Officer Kenneth Perry of the U.S. Park Police.

Gentlemen, it's a pleasure to present this to you.

Attorney General Smith. Mr. President, I would like at this time, if I can find him, to present to you, McGruff, our national crime dog.

The President. I've got a kibble right in my pocket. [*Laughter*]

Attorney General Smith. And, Mr. President, one further item.

Chief Turner. Mr. President, from the Washington Area Law Enforcement Officers, we would like to present you with your own McGruff.

The President. Thank you all. God bless you, and thank you for being here.

Note: The President spoke at 10:55 a.m. in the East Room at the White House.

THE WHITE HOUSE

WASHINGTON

May 30, 1984

MEMORANDUM FOR KIP HAWLEY
SPECIAL ASSISTANT TO THE PRESIDENT
FOR INTERGOVERNMENTAL AFFAIRS

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Kansas City Chiefs' Crime Prevention Promotion

You have asked this office for guidance in responding to an inquiry from the Kansas City Chiefs, concerning possible use they might make of the President's recognition of their crime prevention card program during the National Crime Prevention Week ceremony on February 15, 1984. The Chiefs would like to explore the possibility of using footage from the event in public service announcements promoting the program, using a "Presidential logo" on the cards themselves, and using a photograph of the President on posters promoting the program.

I must advise you that we cannot approve any of the suggestions for Presidential involvement in promoting the Chiefs' program. In light of the huge volume of requests he receives, the President has found it necessary generally not to participate in the promotion of particular charitable endeavors. I am certain you will recognize that if the President were to participate in the promotion of the Chiefs' program, he would immediately receive numerous requests to promote the many similar worthy programs sponsored by other professional sports teams. The President does recognize worthy private sector initiatives on appropriate occasions, as he recognized the Chiefs' program at the February 15 ceremony, but such recognition is far different from the active promotion envisioned by the Chiefs.

The Chiefs' program is sponsored by businesses that receive publicity because of their participation, and a promotional role by the President would present the additional problem of perceived endorsement of those businesses. With respect to the suggested use of a "Presidential logo" on the cards, the only such "logo" is the Seal of the President, and its use in this fashion is not permitted.

For all of the foregoing reasons, we cannot approve the suggested involvement of the President in promoting the Chiefs' program. Our decision, of course, is in no sense an adverse reflection on the highly successful and laudable program itself.

Thank you for raising this matter with us.

FFF:JGR:aea 5/30/84
cc: FFFielding/JGRoberts/Subj/Chron

PR014-09

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CORRESPONDENCE TRACKING WORKSHEET

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John

Name of Correspondent: Kip Hawley

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Subject: Kansas City Chiefs' Crime Prevention Promotion

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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	Referral Note:				
CWAT18	D	84/05/16		S	84/05/16
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5/81

THE WHITE HOUSE

WASHINGTON

May 10. 1984

KC Chiefs are not only team that does this - e.g. - Redskins

MEMORANDUM FOR SHERRIE COOKSIE

FROM: KIP HAWLEY

SUBJECT: KANSAS CITY CHIEFS' CRIME PREVENTION PROMOTION

The Kansas City Chiefs Football Team has a well developed crime prevention program in the Missouri-Iowa-Kansas-Nebraska area. The promotion involves distributing "crime prevention cards" to area police departments who then in turn give away these cards to children who ask for them. The cards have a color action shot of the player on one side and a crime prevention tip on the other side ("Don't take rides from strangers"). In the five years of the program, the Chiefs have distributed roughly six million of these crime prevention cards and other professional sports teams use the same idea. The President mentioned the Kansas City Chiefs' program during the February 15 ceremony in honor of Crime Prevention Week. A Kansas City Chiefs player was present at this ceremony and stood on the podium with the President.

Mitch Wheeler, the Director of Promotions for the Chiefs called me yesterday to ask whether the Chiefs could make use of this recognition in their 1984 crime prevention program. The Chiefs would like to explore the possibility of doing three kinds of things:

1. Use television footage from the crime prevention ceremony in which the President applauds the Chiefs' program for use in public service announcements. These announcements would describe the program and would encourage area youngsters to inquire about the program with local police officers.

2. The Chiefs would like to use some sort of Presidential logo on each of the cards that they distribute. This would be similar to the symbol which is used for Presidential physical fitness awards. This logo would be on the front or the back of the card and signify that the crime prevention program has received Presidential recognition.

3. The Chiefs may wish to use a photograph of the event or a photograph of the President in promotional posters that the Chiefs circulate throughout the tri-state area.

Mr. Wheeler indicated to me that the Chiefs were very flexible in what they could do and would naturally mold what they did to whatever legal requirements we have. They have expressed a willingness to clear with us anything that they would wish to produce prior to actual production or use.

Attached is a sample crime prevention card and some other material which describes the program. Please let me know if you have any questions on this and let me know what you think since the Chiefs would like to begin to prepare the materials for the 1984 program.

Thank you for all your help!

kansas city chiefs football club
ONE ARROWHEAD DRIVE • KANSAS CITY, MISSOURI 64129 • AREA CODE 816 • 924-9300

TO: Directors of Elementary Education

FROM: Mitch Wheeler, Promotions Manager

DATE: August 3, 1983

RE: 1983 Chiefs Crime Prevention Card Program

The Kansas City Chiefs would like to have your school district participate in the 1983 crime prevention card program. We believe that this year's program will be better than ever--thanks mainly to the suggestions made by police officers and school teachers over the past four years.

Outlined below is the information that you will need to administer the program. However, if you have any questions or suggestions, please call me at (816) 924-9300. (If I am not available, ask for Kathy Wehner or Donna Scott).

I. Program Summary

The Kansas City Chiefs crime prevention card program has been designed to provide positive encounters between youth and police and to communicate crime prevention/good neighbor tips through a non-authoritarian vehicle. To accomplish this goal, football player cards are distributed exclusively by law enforcement officers to youngsters. The four-color cards include a Chiefs action shot on the front and a football tip cartoon with a corresponding crime prevention tip cartoon illustration on the back. Ten cards are distributed in sets of two for a two-week period each. A youngster must have five encounters with an officer over the ten-week period to collect the entire set.

The program is sponsored by Frito-Lay and KCTV-5. The cards are provided free to law enforcement officers who distribute the cards to youngsters. The program is administered by the Kansas City Chiefs Promotions Department.

Since the program began in October 1979, over 12 million cards have been distributed by 150 different law enforcement agencies throughout the four-state area. Each year ten new cards are distributed making each set a collector's item. In many areas, Kiwanis Clubs have assisted the agencies with the implementation of this program. The 1983 program will include over 160 police departments distributing 4 million cards throughout Missouri, Kansas, Iowa and Nebraska.

News releases, publicity materials and television and radio public service announcements have been developed to inform the public about the program. Posters are printed

OVER

D. Police at the schools

For the crime prevention card program to be effective the police must go where the young people are--in the schools.

1. The playground - School principals should encourage their local police departments to visit their schools on a regular basis. Example: Every Tuesday after school on the playground or, if the weather is bad, in the gymnasium. Repetition in personal encounters between police officers and the students is important.

2. The lunchroom - Encourage police officers to eat lunch in the cafeteria with tne students. This is an excellent means for distributing the cards and even more importantly an ideal way to develop positive relationships. Several police departments have been very successful with this program.

3. Classroom - Local police departments are available to help teach crime prevention in the classroom.

Each school district has a different way of operating. The ideas listed have been successful in many schools. Undoubtedly, many more ideas will be developed. The crime prevention card program is to supplement crime prevention units. Hopefully, schools will take advantage of the opportunity to use these exciting, free crime prevention cards.

III. Crime Prevention Card Distribution Schedule

The cards are distributed in sets of two for a two-week period each. Listed below is the suggested police officer distribution schedule:

August 15	Mackovic and Condon
August 29	Spani and Carson
September 12	Budde and Burruss
September 26	Green and Bell
October 10	Lowery and Sandi Byrd (Chiefette)

ds

CRIME PREVENTION CARD TELEVISION SPOT

Talent: Station announcer

Time: 20 seconds

Audio: Hey kids! Start collecting your free set of 1983 Kansas City Chiefs crime prevention player cards today. John Mackovic, Nick Lowery, Gary Spani and Gary Green are just four of the ten cards you can collect--FREE. All with pictures of your favorite Chiefs, some great football tips, and some good ways you can help prevent crime. Collect all ten. Get them FREE from your neighborhood police officer.

Video: Use footage of a police officer handing out the cards to youngsters.

* Contact your local television station about filming this spot.

THE WHITE HOUSE

WASHINGTON

June 1, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Correspondence From Strom Thurmond Requesting Opportunity for a Constituent to Present a Painting to the President

Pam Turner has asked if we have any objection to a proposed gift to the President of a painting entitled "Memories." Senator Thurmond has indicated that the artist, a South Carolinian, would like to present his creation to the President. Turner states that she would be happy to consider the presentation for Congressional Hour, but is concerned because the painting depicts a commercial product -- a can of Calumet baking powder.

I see no problem with the President accepting the painting. The painting hardly constitutes a commercial endorsement of Calumet baking powder, any more than Andy Warhol's Campbell's soup cans did of Campbell's soup. The can is depicted not because of the attributes of Calumet baking powder but because the can, at least to the artist, evokes a bit of Americana.

Turner asked us only for our views on the possible commercial endorsement problem; I did not get the impression that a final decision had been reached on whether the painting will be presented to the President. Accordingly, it is not necessary at this time to prepare the forms for donation of the painting to the Ronald Reagan library. The attached proposed memorandum for Turner notes that we do not object to a possible presentation of the painting because it includes a depiction of a commercial product.

Attachment

THE WHITE HOUSE

WASHINGTON

June 1, 1984

MEMORANDUM FOR PAMELA J. TURNER
DEPUTY ASSISTANT TO THE PRESIDENT
FOR LEGISLATIVE AFFAIRS (SENATE)

FROM: FRED F. FIELDING Orig. signed by FFF for RAH
COUNSEL TO THE PRESIDENT

SUBJECT: Correspondence From Strom Thurmond Requesting Opportunity for a Constituent to Present a Painting to the President

You have asked if this office has any objections to the presentation to the President of a painting containing a depiction of a commercial product. Specifically, you indicated that you were considering a proposal that South Carolina artist Jim Harrison present his work "Memories" to the President. "Memories" depicts an arrangement of daisies in a can of Calumet baking powder.

We have no objection to the possible presentation on the ground that it could be construed as a commercial endorsement of Calumet baking powder. The can is depicted in the painting as a bit of Americana and not because of the attributes of Calumet baking powder. The President's receipt of the painting -- presumably for the Presidential library -- could not reasonably be considered a commercial endorsement of Calumet. Accordingly, you are free to consider the presentation as a possibility for Congressional Hour.

Thank you for raising this matter with us.

FFF:JGR:aea 6/1/84
cc: FFFielding/JGRoberts/Subj/Chron

JV

GI002

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

✓

John

Name of Correspondent: Pam Turner

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Correspondence from Strom Thurmond requesting opportunities for the President to present a painting to the President.

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CW Holland	ORIGINATOR	84/05/02 WS			1 1
	Referral Note:				WS
CWAT18	D	84/05/23 WS		S	84/06/02
	Referral Note:				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: Jim Harrison

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 21, 1984

228339 ac

TO: DIANA HOLLAND

FROM: PAM TURNER

SUBJECT: Correspondence from Senator Thurmond

Attached is a letter we recently received from Senator Thurmond requesting an opportunity for a constituent to present a painting to the President. We will be happy to hold it as a Congressional Hour possibility -- pending your approval. Our only concern is that the painting reflects a brand name "Calumet." Does this pose any problems?

We'll await your guidance before responding to Senator Thurmond.

As always, many thanks for your help.

Attachment

The President Pro Tempore

UNITED STATES SENATE

May 15, 1984

Miss Pamela J. Turner
Deputy Assistant to the President
for Legislative Affairs
The White House
Washington, D.C. 20500

Dear Miss Turner:

Attached pleased find a brochure containing information about the work of a South Carolina artist, Mr. Jim Harrison, who would like to present President Reagan with his creation, "Memories."

Although Mr. Harrison had hoped to present this piece prior to Mother's Day, I know that he would be honored to give this fine painting at the President's convenience.

Please keep me informed about the progress of this request, and thank you for your assistance in this matter.

With kindest regards and best wishes,

Sincerely,

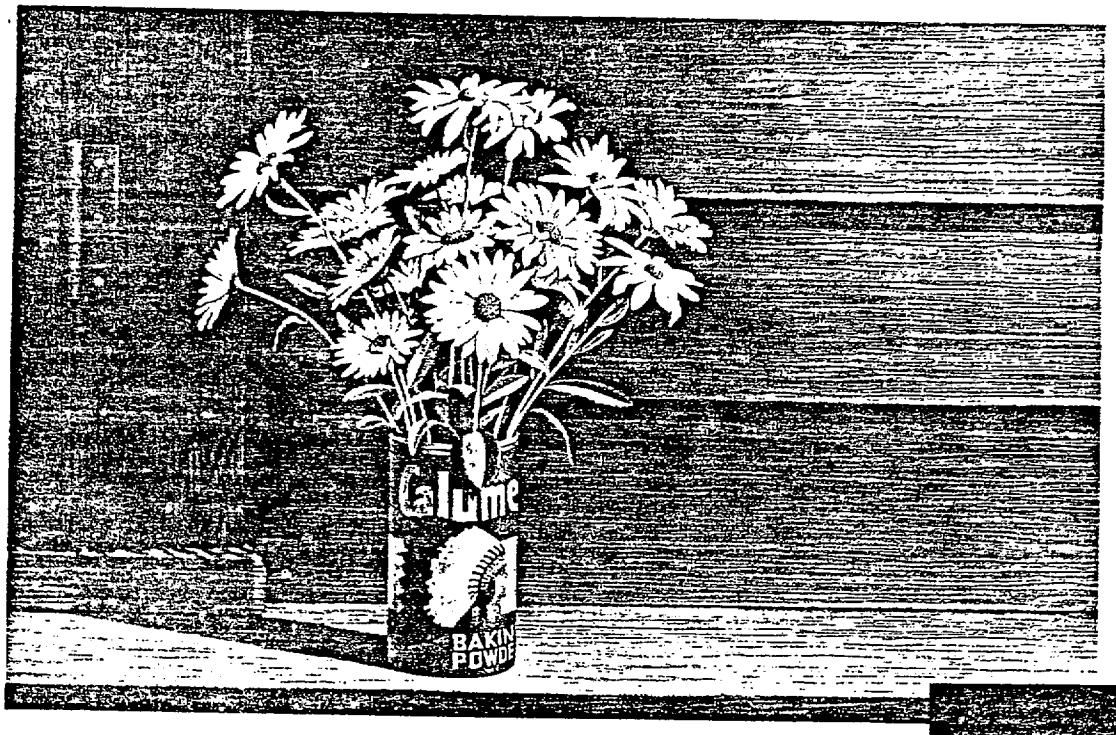
Strom Thurmond

Strom Thurmond

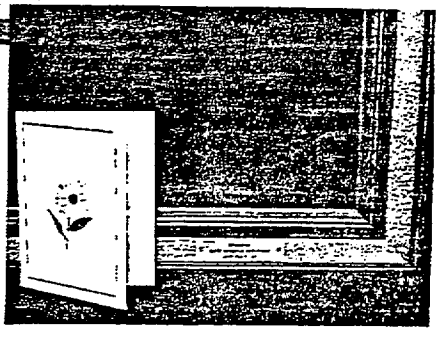
ST/xx
Enclosure

Memories

Jim Harrison



Accompanying each remarqued print: brass plaque to affix to the frame and notecard bearing a reproduction of the remarque for your convenience in gift giving.



MEMORIES by Jim Harrison
21½ x 29½
750 SN $90
Remarqued $135

Original: Acrylic

Commission your *Memories* remarque on or before April 13, 1984. No orders accepted after that date. Delivery for Mother's Day, May 13, guaranteed.

In all my years I've never really ventured a great distance away from my mama's house. As a matter of fact, moving right across the street is about as far as I've gotten. So I had the pleasure of watching mama go about her daily doings until she passed away a year ago. I now spend an awful lot of time in and around her house remembering... how she talked, how she walked, and all the little things like her picking flowers from her yard and sticking them in anything, anywhere.

Gone now are the flowers, gone is the old can... and mamma's gone too... but oh the memories aren't... Never... Never...

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